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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BENEDICTO DOMINGUEZ, Plaintiff and Respondent, v. ALDEN ENTERPRISES, INC., et al., Defendants and Appellants.	B203182 (Los Angeles County Super. Ct. No. BC365346)

APPEAL from an order of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed.

Horowitz & Clayton, Craig A. Horowitz, Wayne D. Clayton and Steven H. Taylor, for Defendants and Appellants.

Doumanian & Associates and Nancy P. Doumanian for Plaintiff and Respondent.

Alden Enterprises, Inc. (Alden) and Longwood Management Corporation (Longwood; collectively defendants) moved to compel Benedicto Dominguez to arbitrate his wrongful termination action against them. The trial court found that defendants had waived the right to arbitrate, and that the parties' arbitration agreement was unconscionable and unenforceable. Defendants appeal the trial court's order denying their petition to compel arbitration. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, defendants hired Benedicto Dominguez to work as a nursing assistant at the Alden Terrace Convalescent Hospital. Dominguez received a 52-page employee handbook when he began working. The first page informed him that the handbook was intended to "offer two-way communication: what you can expect from us [the employer], and what we expect from you." It also warned that the handbook was only a summary of employment benefits and policies, and it "should not be construed as creating any kind of 'employment contract,' since [Longwood] reserves the right to add, change or delete *Handbook* provisions without notice concerning wages, benefits, policies and all other working terms and conditions . . . ." On pages 50 and 51, the handbook detailed an arbitration policy:

> "[Longwood] believes in Alternative Dispute Resolution when controversy arises out of an employee's termination. In the event of any dispute arising under or involving any provision of this Agreement or any dispute regarding an employee's employment with the Company or the termination of employment (except for claims for workers' compensation, unemployment insurance, and any matter within the jurisdiction of the California Labor Commissioner), the dispute shall be resolved by final and binding arbitration as provided for by the California Arbitration Act, California Code of Civil Procedure, Section 1280, et. seq. Arbitration shall be the exclusive method for resolving any such dispute, provided, however, that either the employee or the Company may request equitable relief, including but not limited to injunctive relief, from a court of competent jurisdiction."

The five following paragraphs described various arbitration procedures. The handbook stated that the employee and the Company would equally share the costs of arbitration.[1]

In addition to the handbook, Dominguez received a two-page form entitled "Employee Acknowledgement of Receipt of Employee Handbook." The form's first paragraph stated: "This will acknowledge that I have received my copy of the [Longwood] Employee *Handbook* and that I will familiarize myself with and agree to be bound by its contents." The form indicated that Longwood retained the right to modify the handbook's provisions without notice or consent of any person. In bold, italicized text, the acknowledgement stated that the employment relationship was at-will, notwithstanding any of the handbook's disciplinary procedures. Also in bold, italicized text was an agreement to arbitrate:

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[1] The remaining provisions read as follows:

"If the employee or the Company does not make a written request for arbitration within one (1) year of the occurrence giving rise to a dispute, that party will have waived its right to raise any claim, in any forum, arising out of that dispute. [¶] The employee and the Company will select an arbitrator by mutual agreement. If the employee and the Company are unable to agree on a neutral arbitrator, the Company will obtain a list of arbitrators from the Federal Mediation and Conciliation Service. The employee and the Company will alternately strike names from the list, with the employee striking the first name, until only one name remains. The remaining person shall be the arbitrator. Arbitration proceedings will be held in California at a location mutually convenient to the employee and the Company. [¶] The arbitrator shall conduct a hearing in a manner to be mutually agreed upon by the employee and the Company, or by the arbitrator if the parties cannot agree, provided, however, that the parties shall have the opportunity to call witnesses under oath, and to examine and cross examine all witnesses who appear at the hearing. [¶] Following the hearing, the arbitrator shall issue a written opinion and award which shall be signed and dated. The arbitrator's award shall decide all issues submitted by the parties, and the arbitrator may not decide any issue not submitted. The arbitrator's award shall set forth the legal principles supporting each part of the opinion. The arbitrator shall be permitted to award only those remedies in law or equity which are requested by the parties. [¶] The employee and the Company shall each bear their own costs for legal representation in an arbitration proceeding. The cost of the arbitrator, court reporter, if any, and other incidental costs of arbitration shall be equally shared between the employee and the Company."

> "I also agree that in the event of any dispute arising under or involving any provision of this Handbook or any dispute regarding an employee's employment with the Company or the termination of employment the dispute shall be resolved by final and binding arbitration as provided for by the California Arbitration Act, California Code of Civil Procedure, section 1280, et. seq."

Dominguez signed and dated the bottom of the first page of the acknowledgement, which contained the arbitration provision. The bottom of the second page had a separate signature block, which Dominguez also signed and dated.

In March 2006, defendants terminated Dominguez's employment. In January 2007, Dominguez filed suit claiming that defendants had wrongfully terminated him in retaliation for his complaints about health and safety code violations and patient abuse at the hospital. Dominguez alleged causes of action for wrongful termination in violation of public policy, breach of implied contract, intentional infliction of emotional distress, and wrongful termination in violation of public policy based on Labor Code section 1102.5 and Welfare and Institutions Code section 15600.

At the time Dominguez filed his complaint, he was also prosecuting a putative wage and hour class action against defendants. At a July 18, 2007 mediation, the parties were able to resolve the class action, but not Dominguez's wrongful termination claims. On August 8, 2007, defendants moved to compel arbitration of Dominguez's complaint. Defendants attached a copy of the employee handbook and Dominguez's signed acknowledgement form to their petition. Anticipating Dominguez's arguments in opposition to the petition to compel arbitration, defendants' counsel also submitted a declaration stating that defendants stipulated to "pay the arbitrator's fees and all costs unique to the arbitration forum, but not incidental costs that plaintiff would be required to pay in court."

Dominguez opposed the petition to compel arbitration. He argued that defendants had waived the right to arbitrate by failing to assert it as an affirmative defense, and because they had delayed in filing a petition. Dominguez also argued that there was no agreement to arbitrate because there had been no meeting of the minds between the

parties. Dominguez contended that the arbitration agreement was concealed in the handbook. He submitted a declaration in Spanish, with an English translation, in which he asserted that he did not fully appreciate or understand that when he signed the form acknowledging receipt of the handbook he was also agreeing to binding arbitration. He also declared that while he can speak "some English," he is not proficient in reading, writing, or understanding English. He stated that sometimes defendants gave him documents in Spanish, but no one ever translated the acknowledgement into Spanish for him, nor was the arbitration agreement explained to him in either Spanish or English.

Dominguez further argued that the agreement was procedurally and substantively unconscionable. He contended that the agreement was adhesive, and that it lacked mutuality at least in part because defendants had reserved the right to modify the provisions in the handbook without notice. He further asserted that the agreement could not be enforced because it required Dominguez to share the costs of arbitration, and that he had never agreed to arbitrate claims against Alden.

In their reply, defendants conceded that the arbitration agreement was procedurally unconscionable. But they denied that it was substantively unconscionable, describing the arbitration agreement as the acknowledgement form rather than the arbitration policies contained in the handbook. Defendants also contended that the court could sever the costs provision and enforce the rest of the agreement.

The trial court denied the petition to compel arbitration, explaining: "The confluence of factors including the acknowledged procedural unconscionability and the not satisfactorily explained delay in raising the arbitration issue persuade the court that the provision for arbitration should not be enforced."

DISCUSSION

I. The Trial Properly Found the Arbitration Agreement Unenforceable

A. The Agreement

The trial court concluded that there was an arbitration agreement, but that it was unenforceable.[2] We agree, but first find it necessary to clarify exactly what constitutes the agreement.

Defendants gave Dominguez a handbook that contained a detailed arbitration policy. Dominguez signed an acknowledgement of receipt of the handbook and agreed to be bound by its contents. However, the acknowledgement also set forth a separate provision indicating that Dominguez agreed that all disputes relating to his employment would be resolved by final and binding arbitration under the California Arbitration Act (CAA). Dominguez signed and dated both pages of the acknowledgement. Defendants argue that the acknowledgement form's arbitration provision stands alone as the parties' arbitration agreement. Dominguez focuses on the arbitration policies reflected in the handbook, and ignores the separate statement reflected on the acknowledgement form. Determining what constitutes the arbitration agreement requires interpretation of written documents—the handbook and acknowledgement—and extrinsic evidence is unnecessary. It is therefore a question of law for our independent review. (*Romo v. Y-3 Holdings, Inc.* (2001) 87 Cal.App.4th 1153, 1158 (*Romo*).)

We believe the acknowledgement form sets forth the arbitration agreement. Thus, the question is whether that agreement also includes the handbook's provisions, which define the scope of arbitration and establish various procedures. Under California law, " ' "[a] contract may validly include the provisions of a document not physically a part of the basic contract. . . . 'It is, of course, the law that the parties may incorporate by

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[2] The trial court apparently rejected the argument that the parties did not form an arbitration agreement because Dominguez's minimal English skills prevented a meeting of the minds. Because we find the trial court subsequently concluded that the arbitration agreement was not enforceable, we decline to further address Dominguez's contention that no arbitration agreement was formed.

reference into their contract the terms of some other document. [Citations.] *But each case must turn on its facts.* [Citation.] *For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties*." ' " [Citations.]' [Citation.]" (*Baker v. Osborne* (2008) 159 Cal.App.4th 884, 895.)

Here, the handbook was known and easily available to Dominguez. But the arbitration agreement on the acknowledgement form does not reference the arbitration policies contained in the handbook. In fact, the agreement refers to the handbook only to state that any disputes "arising under or involving any provision" of the handbook would be *subject* to arbitration. Rather than incorporating the handbook's provisions, the agreement indicates simply that disputes "shall be resolved by final and binding arbitration as provided for by the California Arbitration Act." (Cf. *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199 (*24 Hour Fitness*) [handbook acknowledgement stated employee agreed to submit to arbitration according to the procedures outlined in a separate employment arbitration procedures manual specifically incorporated by reference into the handbook]; *Kinney v. United Healthcare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1326-1327 [handbook acknowledgement required employee to agree to submit employment disputes to arbitration " 'under [United's] policy' "].)

Not only does the acknowledgement form's arbitration agreement fail to incorporate or even reference the handbook's separate provisions, the form and the handbook explicitly and repeatedly disclaim that the handbook's policies create any contractual relationship. Both documents declare that nothing in the handbook creates "any kind of 'employment contract,' " in part because Longwood reserves the right to add, change, or delete provisions at any time without notice or the employee's consent. Dominguez agreed to be "bound" by the contents of the handbook. But this is not enough to turn the arbitration policies into a binding agreement in view of both the fact that the handbook by its own terms does not create contractual obligations, and that

Dominguez signed a separate agreement to arbitrate all disputes under the CAA without reference to the handbook's provisions. (Cf. *Bianco v. H.F. Ahmanson & Co.* (C.D. Cal. 1995) 897 F.Supp. 433, 440 ["An employee handbook which states on its face that it 'is not intended to constitute or create, nor is it to be construed to constitute or create, the terms of an employment contract' cannot be a promise or a commitment to future behavior"].)

Caselaw concerning arbitration provisions contained in an employee handbook is instructive. In *Romo*, the court found that an employee was not bound to arbitrate based on an arbitration policy contained in an employee handbook. The section of the handbook containing the arbitration provision required an employee signature. (*Romo, supra*, 87 Cal.App.4th at p. 1155.) However, the handbook also included a form requiring the employee to acknowledge that he had received and read the handbook, and to agree to abide by the handbook's policies. (*Id.* at p. 1156.) The employee signed the general acknowledgement, but not the separate section regarding arbitration. The court concluded that the handbook contained two separate and severable agreements: an agreement to arbitrate and an agreement to comply with the handbook's other policies. (*Id.* at p. 1159.) The general handbook acknowledgement did not refer to an agreement to arbitrate, and further required the employee to state he understood that the handbook's policies could not be construed to imply a contract. (*Ibid.*) Because the employee had not signed the separate section about arbitration it could not be enforced against him. (*Id.* at pp. 1159-1160.)

In *Mitri v. Arnel Management Company* (2007) 157 Cal.App.4th 1164 (*Mitri*), the court also found that employees could not be compelled to arbitrate based on an arbitration policy contained in an employee handbook. The handbook's arbitration policy described various procedures for arbitration and stated that employees would be required to sign an arbitration agreement. (*Id.* at p. 1167.) However, no separate arbitration agreement was ever produced. (*Id.* at p. 1168.) The employer argued that the employees' acknowledgement of receipt of the handbook evidenced their acquiescence to the handbook's arbitration policy. (*Id.* at p. 1173.) The court rejected this argument,

noting that the acknowledgement form "relegates the employee handbook's status to 'an excellent resource for employees with questions about the Company,' and further states the employee handbook is 'designed to acquaint new employees . . . with Human Resource policies, operational issues, employee services, and benefits that reflect the desire to provide a professional work environment.' . . . [¶] Conspicuously absent from the acknowledgement receipt form is any reference to an *agreement* by the employee to abide by the employee handbook's arbitration agreement provision." (*Ibid.*)

It is true that the handbooks and acknowledgements at issue in *Romo* and *Mitri* differ somewhat from those presented here. But both cases indicate that an employee's acknowledgement of receipt of an employee handbook, or an agreement to be bound by the handbook's contents generally, may not be enough to bind the employee to arbitrate under the handbook's arbitration policy in the face of a separable arbitration provision. Here, the acknowledgement form also presents a separate arbitration agreement clause,[3] and, unlike the employees in *Romo* and *Mitri*, Dominguez signed the separate agreement. But in light of the agreement's failure to incorporate the handbook's arbitration provisions in any way, we cannot conclude that Dominguez is also bound by the handbook's arbitration policies.[4]

We therefore consider the enforceability of the one-paragraph agreement to arbitrate printed on the acknowledgement form alone.

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[3] We note that the arbitration agreement and the handbook's arbitration provision describe the scope of arbitration differently. The acknowledgement states that the employee agrees to arbitrate essentially any dispute regarding his employment or the termination of his employment. The handbook's arbitration policy states that all disputes regarding the employee's employment or the termination of employment must be arbitrated, *except for* requests for equitable relief or claims for worker's compensation, unemployment insurance, and matters within the jurisdiction of the California Labor Commissioner.

[4] As noted above, this is the position defendants have adopted almost exclusively in their briefing.

B. Unconscionability Principles

California law strongly favors arbitration as a means of resolving disputes. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97, 115 (*Armendariz*).) However, in order to be enforceable, an arbitration agreement "must also satisfy traditional contract standards of conscionability." (*Nyulassy v. Lockheed Martin Corporation* (2004) 120 Cal.App.4th 1267, 1280 (*Nyulassy*).) The guidelines for unconscionability analysis are well established. "Both procedural and substantive unconscionability are required to invalidate an arbitration clause. [Citations.] Procedural unconscionability focuses largely on oppression and the manner in which the agreement was negotiated. [Citation.] Substantive unconscionability, on the other hand, focuses on the terms of the agreement and the presence of overly harsh or one-sided results. [Citation.] The two aspects need not be present to the same degree. '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.]" (*Martinez v. Master Protection Corporation* (2004) 118 Cal.App.4th 107, 113 (*Martinez*); see also *Armendariz*, *supra*, 24 Cal.4th at pp. 113-115.)

"Unconscionability is a question of law subject to de novo review, 'although factual issues may bear on that determination. [Citations.]' [Citations.]" (*Thompson v. Toll Dublin, LLC* (2008) 165 Cal.App.4th 1360, 1369.)[5]

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[5] " '[W]here an unconscionability determination "is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence." [Citation.]' " (*Ontiveros v. DHL Express* (*USA*), *Inc.* (2008) 164 Cal.App.4th 494, 502 (*Ontiveros*).) Here, the only factual issue below involving extrinsic evidence was whether Dominguez's lack of fluency in English either prevented formation of a valid arbitration agreement, or caused procedural unconscionability. Because we affirm the order on separate grounds, we do not consider these arguments. The remaining issues presented below did not involve disputed extrinsic evidence.

C. The Arbitration Agreement Is Procedurally and Substantively Unconscionable

Defendants have conceded that the arbitration agreement is procedurally unconscionable. When an employee is required to execute an arbitration agreement as a prerequisite of employment without an opportunity to negotiate, the agreement will be deemed adhesive and procedurally unconscionable. (*Armendariz, supra*, 24 Cal.4th at pp. 115-116; *Martinez*, *supra*, 118 Cal.App.4th at p. 114.) However, a court may not find an agreement unenforceable unless it is tainted by both procedural and substantive unconscionability. (*Armendariz, supra*, 24 Cal.4th at p. 114.) We agree with the trial court's implied finding that the arbitration agreement is substantively unconscionable.

" 'The paramount consideration in assessing [substantive] conscionability is mutuality.' [Citation.]" (*Nyulassy, supra*, 120 Cal.App.4th at p. 1281.) Here, the arbitration agreement lacks mutuality because it requires only the *employee* to agree that all disputes will be submitted to arbitration. Nowhere does it indicate that defendants also agree to submit their covered claims to arbitration. In *Armendariz*, the court held that an arbitration agreement between an employer and employee must have a modicum of bilaterality to be conscionable. "If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose. [Citation.]" (*Armendariz*, *supra*, 24 Cal.4th at p. 118.)

In *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238 (*Higgins*), this court found an arbitration provision similar to the one at bar substantively unconscionable. *Higgins* concerned arbitration provisions containing the language: "I agree that any and all disputes or controversies arising under this Agreement or any of its terms, any effort by any party to enforce, interpret, . . . terminate or annul this Agreement, or any provision therof . . . shall be resolved by binding arbitration . . . ." (*Id.* at p. 1243.) We determined that the arbitration provision required only the weaker signing parties to submit their

claims to arbitration and was therefore impermissibly one-sided: "The clause repeatedly includes 'I agree' language, with the 'I' being a reference to the [petitioners]. . . . [¶] The television defendants claim that the arbitration provision is bilateral, because 'all disputes or controversies arising under this Agreement or any of its terms, any effort by any party to enforce . . . this Agreement . . . and any and all disputes or controversies relating to my appearance or participation in the Program, shall be resolved by binding arbitration.' . . . Thus, 'all disputes' are subject to arbitration, and either side may move to compel. But they miss the point: only one side (petitioners) agreed to that clause." (*Id.* at pp. 1253-1254.)

The same reasoning applies here. Although defendants have asserted that the agreement binds the employer to arbitrate and is not one-sided, the plain language of the agreement mandates the opposite conclusion. Defendants did not indicate in the arbitration agreement or elsewhere on the acknowledgement form that the employer is bound to arbitrate claims arising out of the employee's employment. On the form, the only party agreeing to anything is Dominguez. As noted in *Armendariz*, although an agreement may not expressly authorize litigation of the employer's claims, "the lack of mutuality can be manifested as much by what the agreement does not provide as by what it does." (*Id.* at p. 120; see also *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 273-276 (*O'Hare*).)

The language of arbitration agreements in other cases is also informative. For example, in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 (*Little*), there was no issue of lack of mutuality, but the agreement at issue provided: " 'I agree that any claim, dispute, or controversy . . . which would otherwise . . . allow resort to any court or other governmental dispute resolution forum between myself and the Company . . . shall be submitted to and determined exclusively by binding arbitration . . . . I understand by agreeing to this binding arbitration provision, *both I and the Company give up our rights* to trial by jury.' " (*Id.* at pp. 1069-1070, 1075, fn. 1, italics added.) Thus, the agreement explicitly stated that both parties would be bound to arbitrate disputes. Similarly, in *24 Hour Fitness*, *supra*, 66 Cal.App.4th 1199, there was no bilaterality problem, but the

agreement, contained in a personnel handbook, provided: "If any dispute arises from your employment with Nautilus [the employer], *you and Nautilus agree that you both will submit it exclusively to final and binding arbitration*." (*Id.* at p. 1205, italics modified.) The employee signed a handbook acknowledgement in which she specifically agreed to submit disputes to arbitration in accordance with the handbook's provisions. (*Ibid.*)

Unlike the arbitration agreements in *Little* and *24 Hour Fitness*, the agreement before us includes no language that indicates Dominguez's agreement to submit all disputes to arbitration is equally binding on defendants. As in *Higgins*, we conclude that it is therefore unduly one-sided and substantively unconscionable. (Cf. *Gibson v. Neighborhood Health Clinics* (7th Cir. 1997) 121 F.3d 1126, 1131 [finding arbitration agreement unenforceable due to lack of consideration where only the employee explicitly promised to arbitrate claims; the court rejected the argument that language contained in employee handbook binding employer to arbitrate could serve as consideration for employee's promise to arbitrate].)

D. Severability

Even when an arbitration agreement is both procedurally and substantively unconscionable, the court should consider "whether the presence of the unconscionable provisions warrants a refusal to enforce the entire arbitration agreement, or whether the offending provisions may be limited or severed to avoid an illegal result. [Citations.] 'The overarching inquiry is whether ' " 'the interests of justice . . . would be furthered' " by severance.' [Citations.] 'If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.' [Citation.]" (*Martinez*, *supra*, 118 Cal.App.4th at p. 119.)

Here, there is no single term that the court could sever to remedy the defect. To remove any "unconscionable taint," the court would have to reform or augment the agreement with additional terms that would bind defendants to arbitrate claims falling

within the scope of the agreement. As explained in *Armendariz*, courts do not have this authority, and may only cure unconscionability through severance or restriction. (*Armendariz*, *supra*, 24 Cal.4th at p. 125.) "[A]n arbitration agreement . . . that contains unconscionable aspects that cannot be cured by severance, restriction, or duly authorized reformation, should not be enforced." (*Id.* at p. 126; see also *Ontiveros*, *supra*, 164 Cal.App.4th at p. 515.) Thus, the trial court properly denied defendants' petition to compel arbitration.

E. Even if Considered, the Handbook Contains Substantively Unconscionable Provisions

Were we to consider the handbook's more detailed arbitration policies, we would still conclude that the arbitration agreement is unconscionable and unenforceable. Although some of the handbook's language suggests that Longwood is equally bound to arbitrate disputes regarding an employee's employment, it contains other problematic provisions: the costs-sharing provision, and Longwood's reservation of the right to unilaterally modify any part of the handbook without notice.

Defendants appropriately concede that the handbook's provision requiring the employee to split the costs of arbitration is substantively unconscionable.[6] (*Little*, *supra*, 29 Cal.4th at pp. 1082-1085; *Ontiveros*, *supra*, 164 Cal.App.4th at pp. 510-511;

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[6] Although defendants conceded the unconscionability of the costs provision below, they also attempted to ameliorate the problem by submitting a declaration from counsel reporting defendants' willingness to pay all costs unique to arbitration. We explicitly rejected this tactic in *Martinez*, in which we held an "after-the-fact expression of willingness to amend the arbitration agreement to conform to law is ineffective. . . . The mere inclusion of the costs provision in the arbitration agreement produces an unacceptable chilling effect, notwithstanding [the employer's] belated willingness to excise that portion of the agreement." (*Martinez*, *supra*, 118 Cal.App.4th at pp. 116-117; see also *Armendariz*, *supra*, 24 Cal.4th at p. 125; *O'Hare*, *supra*, 107 Cal.App.4th at p. 280.) While an employer is not prohibited from offering to modify an arbitration agreement to pay the costs of arbitration, any late offer to pay arbitration costs is *not relevant* to the issue of whether an already existing arbitration agreement is substantively unconscionable.

Martinez, supra, 118 Cal.App.4th at pp. 116-117.) However, they dispute that the reservation of the right to modify the handbook's provisions created substantive unconscionability, relying on *24 Hour Fitness*. In *24 Hour Fitness*, Division Three of this appellate district considered whether an employer's reservation of the right to modify an employee handbook that included an arbitration provision rendered the arbitration agreement illusory and lacking in consideration. (*24 Hour Fitness, supra,* 66 Cal.App.4th at p. 1214.) The court held that the contract was not illusory because the employer's "discretionary power to modify the terms of the personnel handbook in writing notice indisputably carries with it the duty to exercise that right fairly and in good faith. [Citation.] So construed, the modification provision does not render the contract illusory." (*Ibid.*)

Two factors distinguish *24 Hour Fitness*. First, the court did not consider whether the employer's discretionary right to modify the handbook, including the arbitration provision, rendered the arbitration agreement substantively unconscionable. More importantly, the arbitration agreement in *24 Hour Fitness* required the employer to give the employee notice of modifications after any changes were made. (*24 Hour Fitness, supra,* 66 Cal.App.4th at p. 1214.) In contrast, here defendants have no obligation to provide any notice of modifications whatsoever. Defendants could modify the scope of the arbitration agreement or change any of the procedures, thereby purporting to bind the employee without giving him the chance to reject the modifications. While the implied duty of good faith and fair dealing may prevent the modification provision from rendering the agreement illusory, we conclude that it inserts an element of unduly harsh or oppressive results. (Cf. *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1179 [provision giving company the unilateral power to terminate or modify an adhesive arbitration agreement was substantively unconscionable].)

It should also be noted that amongst the list of other "fatal defects" Dominguez asserts are present in the handbook's arbitration policy that render it unenforceable is a one-year statute of limitations. This court has previously found shortened limitations periods in an arbitration agreement substantively unconscionable when they restrict an

employee's statutory rights. (*Martinez, supra*, 118 Cal.App.4th at p. 117; see also *Nyulassy, supra*, 120 Cal.App.4th at p. 1283, fn. 12 [shortened limitations period was one factor leading to determination that agreement was substantively unconscionable].)

Although the costs-sharing provision could be severed, (*McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 101-102), curing the unconscionability created by the modification provision would require more than simple severance or restriction. Therefore, the trial court would not have abused its discretion in declining to sever the unconscionable provisions of the handbook's arbitration policy. (*Ontiveros, supra*, 164 Cal.App.4th at p. 515; *Nyulassy, supra*, 120 Cal.App.4th at pp. 1287-1288.)

In light of our conclusions above, we need not consider whether defendants waived the right to arbitrate or Dominguez's other contentions regarding the unenforceability or invalidity of the arbitration agreement.

DISPOSITION

The order denying defendants petition to compel arbitration is affirmed. Respondent is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.